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No. 92-308

FILED
OCT 28 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOHN DOE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly dismissed for lack of jurisdiction petitioner's appeal from the denial of a motion under Fed. R. Crim. P. 41(e) for the return of business records obtained from a third party through a grand jury subpoena.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 3a-4a) is unpublished, but the decision is noted at 961 F.2d 209 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1992. A petition for rehearing was denied on May 18, 1992. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on August 12, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On February 27, 1991, a grand jury sitting in the United States District Court for the Eastern District of Pennsylvania issued a subpoena *duces tecum* to Tranel, Inc., for the production of any and all documents, files and computerized records of Amin A. Rashid & Associates located on the 30th floor of an office building in Philadelphia, Pennsylvania. After the documents were produced, petitioner filed a motion for return of the documents and records pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure. The district court denied the motion, and petitioner appealed. Pet. App. 5a. The court of appeals dismissed the appeal for lack of jurisdiction. *Id.* at 3a-4a.

1. Petitioner is the target of a grand jury investigation into mail fraud, wire fraud and money laundering offenses arising out of a suspected scheme in which petitioner, operating as Amin A. Rashid & Associates, P.C., induced persons seeking sizeable commercial loans to provide him with advance fees based upon false representations as to the availability of the loans. Gov't C.A. Br. 3.

On August 1, 1989, petitioner signed a five-year lease on behalf of Amin A. Rashid & Associates, P.C., with Binswanger Management Corp. for the entire suite of offices and furniture located on the 30th floor of the Lewis Tower Building in Philadelphia. Pet. App. 82a. Between June 1990 and April 1991, the office building was owned by Tranel, Inc., which designated Binswanger as its agent for the management of the building, the collection of rent, and similar matters. In the event of nonpayment of rent, the lease

provided that petitioner could be evicted and Binswanger could enter the leased premises "by force or otherwise." Pet. App. 91a. The lease further provided that all property located in the leased premises following eviction was subject to distraint to satisfy amounts owed under the lease. Gov't C.A. Br. 3-4; Pet. App. 91a-93a; C.A. App. 86a-87a.

By November 1990, petitioner had been delinquent on his rent payments for the past year. After a rent check was dishonored on December 14, 1990, Binswanger notified petitioner's counsel that petitioner would be locked out of the offices on the following Monday, December 17. At that time, petitioner owed approximately $20,000 in rent. On December 17, petitioner was evicted from the leased premises by the Philadelphia sheriff pursuant to a writ of possession obtained by Binswanger. The day after his eviction, petitioner leased office space in another building in Philadelphia. Gov't C.A. Br. 4-5; Pet. App. 36a-40a, 45a-48a, 51a-52a, 65a; C.A. App. 87a-89a.

The government learned of the existence of petitioner's records at his former offices in the Lewis Tower Building on January 25, 1991. One month later, on February 28, 1991, Postal Inspector Carol Hazelton served a grand jury subpoena on Jeffrey Seligsohn, the leasing and management agent for Binswanger. Pet. App. 21a. The subpoena called for the production of "[a]ny and all documents, files and computerized records of Amin A. Rashid and Associates" located in petitioner's former offices on the 30th floor in the Lewis Tower Building. *Id.* at 120a-121a. Seligsohn made arrangements with the building manager, Chris D'Erasmo, to give the government

agents access to the offices. Gov't C.A. Br. 5-7; Pet. App. 21a-26a, 32a-33a; C.A. App. 87a-88a.

On March 4, 1991, D'Erasmo opened petitioner's former offices in the Lewis Tower Building for Postal Inspector Hazelton and an FBI agent, who inspected the records and documents left there. D'Erasmo also gave the agents permission to drill open three locked file cabinets containing documents. The agents returned the next day and removed approximately 30 boxes of records and documents relating to Amin A. Rashid & Associates from petitioner's former offices. Gov't C.A. Br. 6-8; Pet. App. 26a-32a, 53a-56a.

2. On May 24, 1991, nearly three months after Binswanger fully complied with the grand jury subpoena, petitioner filed in the United States District Court for the Eastern District of Pennsylvania a "Motion for Return of Seized Property Pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure." That motion demanded the immediate return of the records and documents produced by Binswanger in response to the grand jury subpoena.[1]

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[1] As amended effective December 1, 1989, Rule 41(e) provides:

> **(e) Motion for Return of Property.** A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property. The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings. If a motion

Petitioner asserted that the records and documents were unlawfully seized because the government agents did not have a search warrant. After the government responded to the motion, petitioner filed a "Supplemental Motion for Return of Seized Property Pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure." Among other things, that supplemental motion referred to a grand jury subpoena for handwriting exemplars and fingerprints served on petitioner (with which petitioner had complied voluntarily) and to subpoenas served on other witnesses. See Supplemental Motion at ¶¶ 13, 25. Following an evidentiary hearing, the district court summarily denied the motions. Pet. App. 5a.

3. The court of appeals dismissed petitioner's appeal from the order denying his motions. Pet. App. 3a-4a. Citing *United States* v. *Furina*, 707 F.2d 82 (3d Cir. 1983), the court dismissed the appeal "for lack of appellate jurisdiction." Pet. App. 3a.

ARGUMENT

Petitioner contends that the court of appeals erroneously dismissed his appeal for lack of jurisdiction. Pet. 8-12. In *DiBella* v. *United States*, 369 U.S. 121, 131-132 (1962), this Court held that a district court's ruling on a pre-indictment motion to suppress evidence under Rule 41(e) is a nonappealable interlocutory order unless "the motion is solely for [the] return of property *and* is in no way tied to a criminal

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for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

prosecution *in esse* against the movant" (emphasis supplied). Accord *United States* v. *Furina*, 707 F.2d at 84; see generally 3 W. LaFave & J. Israel, *Criminal Procedure* § 26.2(d), at 198-202 (West 1984). Because petitioner's motion failed to satisfy each of those two requirements for appealability, the court of appeals properly dismissed his appeal. That conclusion does not warrant further review.

1. Petitioner does not dispute (Pet. 8-12) that the pendency of a grand jury investigation into his activities is a criminal prosecution "in being" for purposes of the rule announced by this Court in *DiBella*. See *DiBella* v. *United States*, 369 U.S. at 131 ("[p]resentations * * * before a grand jury * * * are parts of the federal prosecutorial system leading to a criminal trial. Orders granting or denying suppression in the wake of such proceedings are truly interlocutory, for the criminal trial is then fairly in train"). See also *United States* v. *Ryan*, 402 U.S. 530, 533 (1971).[2] Instead, petitioner principally contends

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[2] As the Third Circuit held in *United States* v. *Furina*, 707 F.2d at 84, the majority of the other courts of appeals hold that a pending grand jury investigation is "a criminal prosecution *in esse*" within the meaning of *DiBella* that renders a ruling on a Rule 41(e) motion nonappealable. See *United States* v. *Regional Consulting Services*, 766 F.2d 870, 872-873 (4th Cir. 1985); *DeMassa* v. *Nunez*, 747 F.2d 1283, 1286-1287 (1984), on reh'g, 770 F.2d 1505 (9th Cir. 1985); *Standard Drywall, Inc.* v. *United States*, 668 F.2d 156, 158-159 (2d Cir.), cert. denied, 456 U.S. 927 (1982); *Imperial Distributors, Inc.* v. *United States*, 617 F.2d 892, 896 (1st Cir.), cert. denied, 449 U.S. 891 (1980); *United States* v. *Glassman*, 533 F.2d 262, 263 (5th Cir. 1976). Several courts of appeals, however, hold that a Rule 41(e) motion is not tied to "a criminal prosecution *in esse*" until a

that the district court's order denying his Rule 41(e) motion is appealable because there is no "*record evidence*" that his motion was " 'tied' to a criminal investigation." Pet. 10. That contention is mistaken. In its response to petitioner's motion in the district court, the government specifically noted that petitioner was "the target of a grand jury investigation involving mail fraud, wire fraud, and money laundering." Gov't Mem. in Opp. to Motion for Return of Seized Property at 1 & 2. At the evidentiary hearing on the motion, the government similarly advised the district court that "the Government's case [against petitioner] involves allegations of mail fraud and the Government believes that these files contained further evidence of mail fraud." Pet. App. 67a. The government also noted that it was "in the process of reviewing the documents to present them as part of the Grand Jury investigation" and "should it be determined that these documents may be returned to [petitioner], we will do so at the earliest occasion." *Id.*

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defendant is formally charged or indicted by the grand jury. See, *e.g.*, *In re Warrant Dated December 14, 1990*, 961 F.2d 1241, 1243 (6th Cir. 1992); *In re Search of Premises Known as 6455 South Yosemite*, 897 F.2d 1549, 1554-1555 (10th Cir. 1990); *In re Search of 949 Erie Street*, 824 F.2d 538, 540-541 (7th Cir. 1987); *In re Grand Jury Proceedings*, 716 F.2d 493, 496 (8th Cir. 1983). As we explain below, that disagreement among the courts of appeals does not warrant review in this case because petitioner sought not only return of the property produced pursuant to the grand jury subpoena but also its suppression in any subsequent criminal prosecution. Under *DiBella* v. *United States*, *supra*, that prayer for suppression constituted an independent and fully adequate reason for dismissing petitioner's appeal.

at 77a; see also Gov't C.A. Answer to Petition for Rehearing 2 n.1. Indeed, petitioner's own motion papers in the district court acknowledged his voluntary compliance with another subpoena issued by the same grand jury. Accordingly, because petitioner is the target of a pending grand jury investigation, the order denying his Rule 41(e) motion is not an appealable order under *DiBella*.

Contrary to petitioner's claim (Pet. 9), the decision of the court of appeals in this case does not conflict with its earlier decision in *Government of the Virgin Islands* v. *Edwards*, 903 F.2d 267 (3d Cir. 1990). *Edwards* does not support the proposition that there was no prosecution "in being" against petitioner. In *Edwards*, the defendant moved for the return of certain items of jewelry that he was wearing when he was arrested after he was convicted of burglary. At trial, the victims of the burglary did not identify any of the jewelry as property stolen from their apartments. The government opposed the motion on the ground that the jewelry might be from another robbery, and it stated that it would ask the police to put an advertisement in the newspaper describing the jewelry and seeking to identify its claimant. *Id.* at 272. There was no indication that a grand jury was conducting an investigation into any crime relating to the jewelry. In those circumstances, the court of appeals concluded that the district court's order denying the motion was appealable because "[t]he mere possibility of a prosecution does not deprive an order of finality." *Ibid.* In any event, even if the Third Circuit's decision in this case conflicted with its decision in *Edwards*, such an intracircuit conflict

would not warrant this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

2. Even if petitioner were correct in his contention that there was no criminal investigation pending against him, further review would be unwarranted because his motion sought not only the return of the records but also their suppression in any subsequent criminal prosecution. Petitioner conceded that he sought suppression of the property during oral argument before the court of appeals, and appears to renew that concession before this Court. See Gov't Answer to Petition for Rehearing 5; Pet. 28 n.16. Indeed, the fact that the government has made the documents available for copying by petitioner (Pet. 6) persuasively demonstrates that his principal motivation in continuing to litigate is to obtain a pre-trial appellate determination that those documents may not be used to prosecute him. The court of appeals therefore properly could dismiss petitioner's appeal on the alternative, and fully sufficient ground, that his motion was not "solely for the return of property." See, *e.g.*, *In re Warrant Dated December 14, 1990*, 961 F.2d at 1244-1245.

3. Petitioner contends (Pet. 9-12) that the order denying his Rule 41(e) motion is appealable because he was an intervenor in the district court proceedings who was not served with the grand jury subpoena through which his records were obtained. That contention rests, however, on a fundamental misunderstanding of the difference between a motion for return of property under Rule 41(e) and an intervenor's motion to quash a grand jury subpoena directed to a third party who has possession of the intervenor's

records. In *Cobbledick* v. *United States*, 309 U.S. 323 (1940), this Court held that one to whom a grand jury subpoena is directed may not appeal the denial of a motion to quash the subpoena, but rather he must refuse to obey the subpoena and be held in contempt in order to contest its validity. The Court has also concluded, however, that an intervenor may appeal the denial of a motion to quash a subpoena directed to a third party because the third party may not share the interest of the intervenor in challenging the subpoena. Since the third party may simply obey the subpoena to avoid being held in contempt, the denial of immediate review in that context would deprive the intervenor of any review whatsoever of his challenge to the subpoena. See *United States* v. *Nixon*, 418 U.S. 683, 691 (1974); *United States* v. *Ryan*, 402 U.S at 532-534; *Perlman* v. *United States*, 247 U.S. 7, 12-13 (1918); see generally 3 W. LaFave & J. Israel, *Criminal Procedure* § 26.2(f), at 205-208 (West 1984).[3]

Petitioner's appeal did not lie from an order denying a motion to quash the grand jury subpoena to

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[3] Petitioner misplaces his reliance (Pet. 11) on *United States* v. *Nixon*, *supra*. Contrary to petitioner's claim, that case did not involve an intervenor's motion to quash a grand jury subpoena directed to another party. Rather, that case involved a subpoena issued to the President, who was named as an unindicted co-conspirator in a criminal prosecution against his aides and advisers, to produce certain tape recordings and documents. 418 U.S. at 686-688. This Court held that the district court's denial of the President's motion to quash the subpoena was appealable because "the traditional contempt avenue to immediate appeal [under *Cobbledick* was] peculiarly inappropriate due to the unique setting" in which the case arose. *Id.* at 691.

Binswanger. Instead, he appealed solely from the order denying his motion for return of property pursuant to Rule 41(e).[4] Because petitioner is the target of a grand jury investigation and because his Rule 41(e) motion sought the suppression as well as the return of the records and documents obtained through the grand jury subpoena, this case does not fall within "the limited class of cases where denial of immediate review would render impossible any review whatsoever" of petitioner's claims. *United States* v. *Ryan*, 402 U.S at 533. If the grand jury returns an indictment, petitioner will have the opportunity for appellate review of his claims by raising them as part of that criminal prosecution. On the other hand, if the grand jury does not return an indictment, petitioner's property will be returned to him or he may initiate a new proceeding for return of the property. See, *e.g.*, *Standard Drywall, Inc.* v. *United States*, 668 F.2d at 158. Accordingly, the court of appeals' dismissal of petitioner's appeal in this case does not warrant further review.[5]

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[4] In addition to his Rule 41(e) motion, it appears that petitioner also filed a separate Application to Quash the Subpoena and Direct Return of his Documents in the district court. Although it is unclear from the record whether the district court ever ruled on that motion, it is undisputed here that petitioner appealed solely from the district court's denial of the Rule 41(e) motion. See Pet. 6; Pet. App. 5a.

[5] Petitioner also raises a host of other claims (Pet. 13-28) challenging the merits of the district court's denial of his Rule 41(e) motion. Since the court of appeals ruled that the order denying petitioner's motion was not appealable, it had no occasion to consider those claims. Consequently, those claims are not properly presented for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1992